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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LEONARD GRENIER, Plaintiff and Respondent, v. THOMAS L. MILLER et al., Defendants and Appellants.	E049407 (Super.Ct.No. RIC523744) OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Reversed.

Kinkle, Rodiger and Spriggs, Bruce E. Disenhouse and Michael F. Moon, for Defendants and Appellants.

Wallace, Brown & Schwartz, George M. Wallace and Steve R. Schwartz, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants Thomas L. Miller, Christopher L. Peterson, and Reid & Hellyer appeal from the denial of their special motion to strike under Code of Civil Procedure[1] section 425.16. Defendants contend the trial court erred in finding there was a lack of probable cause for filing the underlying action and that plaintiff Leonard Grenier had established a probability of success on his malicious prosecution claim. Defendants also challenge certain evidentiary rulings.

II. FACTS AND PROCEDURAL BACKGROUND

A. The Underlying Action

In June 2004, Catherine C. Davis,[2] represented by defendants in the current action, filed a "Complaint for Damages for Fraud and Deceit; Negligent Misrepresentation of Fact; and Suppression of Facts" against Kelly Baker and Doe defendants. The complaint alleged as follows:

Davis, through her agent, Chad Vanlandingham, had purchased a mare at an auction in Oklahoma in October 2003. Baker and the Doe defendants had represented to Davis, Vanlandingham, and the bidding public at the auction that the mare had only one ovary but was breeding sound. In fact, Baker and the Doe defendants knew the mare was sterile and unable to breed, in that DNA testing had revealed the mare was missing a sex chromosome. Baker and the Doe defendants failed to reveal the mare's condition to

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[1] All further statutory references are to the Code of Civil Procedure.

[2] Davis's agent, Chad Vanlandingham, was named as a plaintiff in the original complaint but was deleted from the first amended complaint.

potential purchasers, but instead represented that the mare could bear offspring. Baker and the Doe defendants intended potential purchasers to rely on their misrepresentations and concealment. Davis did not know the actual condition of the mare. In reliance on Baker and the Doe defendants' representations and concealment, Davis purchased the mare for $28,500, although the mare was actually worth only about $4,000, and Davis had incurred and would incur ongoing expenses for maintaining the mare.

In June 2006, Baker added Grenier as a defendant to the action and amended the complaint to allege a conspiracy between Baker and Grenier to commit fraud and deceit. To support the request to amend the complaint, Peterson filed a declaration stating Grenier had been deposed in April 2006, and the deposition revealed the following information:

Before purchasing the mare, Grenier learned the mare could not breed because that information was contained in the catalog for the sale at which the mare was purchased, and Grenier had reviewed that information before the purchase. In September 2003, Baker owed money to Grenier. Before the auction, Baker had received offers for the mare, but Grenier advised her to try to get more money in the auction, and Baker did so. The check for the mare was paid to Grenier, who cashed the check and retained a portion of the proceeds as partial repayment of the debt Baker owed him. Grenier had paid the fees for Dr. Don Scott Vrono, the veterinarian who had checked out the mare before the auction. Grenier and Baker had together taken the mare to the auction.

The matter proceeded to trial, and following the presentation of the Davis's case-in-chief, the trial court granted Grenier's motion for nonsuit (§ 581c). The court determined there "simply [was] no evidence" presented at trial to support one or more necessary elements of the claims for fraud asserted against Grenier.

B. The Current Action

On April 2, 2009, Grenier filed a complaint for malicious prosecution against defendants. The complaint alleged that defendants acted without probable cause, in that when they filed the underlying action against Grenier, they knew he did not own the mare, consign the mare to the auction, or make any representations to Davis. The complaint alleged defendants had acted with malice, "in that they were attempting to extort money from Mr. Grenier based solely on the fact that" Baker was his "life partner."

On August 4, 2009, defendants filed a special motion to strike under section 425.16, also known as an anti-SLAPP (strategic lawsuit against public participation) motion, on the ground that the sole cause of action asserted against them arose from acts in furtherance of their constitutional rights of petition and free speech, and Grenier could not establish a probability of prevailing on the merits. Defendants also filed a request for judicial notice of various documents from the underlying action.

Grenier filed an opposition to the special motion and submitted declarations from himself, Baker, his counsel, and a veterinarian, Dr. Vrono. Dr. Vrono declared he had examined the mare before the auction sale and had confirmed abnormalities in her

reproductive system. He had prepared a written report disclosing her condition, which was lodged with the auction company and posted on the horse's consignment stall.

Baker declared she was the sole owner of the mare at all times before the sale. She confirmed Dr. Vrono's examination and the posting of his report on the mare's stall. She declared that Davis had not been present at the auction, and Vanlandingham had purchased the horse on Davis's behalf, although he did not disclose he was acting as an agent. Baker declared she had informed Vanlandingham of the mare's reproductive defects.

Grenier declared that his business activities were separate from those of Baker; he had never owned or consigned the mare; he had never had any legal claim to the proceeds of the sale; and he had never communicated with Vanlandingham at the auction.

Defendants filed a reply and objections to Grenier's evidence.

Following a hearing, the trial court denied the motion to strike. The trial court stated, "As attested to in the Declaration, Grenier, and at his deposition, he testified under oath that he did not own the horse at the time of the auction, that he did not consign the [mare] to the [auction], and that he had no interest in the sales proceeds, and he never spoke to [Vanlandingham] at the auction, and also never spoke to [Davis] in his life. . . . [¶] More importantly, the factual situation overall is sufficient to raise a triable issue as to the defendant's actual motivation or purpose in pursuing Grenier, . . . That is, that despite the absence of any direct[] evidence to support liability on his part, they pursued him . . . with . . . an improper purpose of attempting to extort a settlement from him,

knowing that no money was in existence at the time and after, given the questions that he was asked at his deposition."

III. DISCUSSION

Defendants contend the trial court erred in finding there was a lack of probable cause for filing the underlying action and that Grenier had established a probability of success on his malicious prosecution claim.

A. Standard of Review

We review de novo the trial court's ruling on a special motion to strike under section 425.16. In doing so, we conduct an independent review of the entire record. (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 197.)

B. Special Motion to Strike

1. Requirements

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) If the moving party meets the initial burden of showing that the cause of action arose from an act in furtherance of the moving party's right of petition or free speech, "the burden shifts to the opposing party to demonstrate the 'probability that the plaintiff will prevail on the claim.' [Citations.]" (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965 (*Zamos*).) To satisfy its burden, the plaintiff must make a "'"prima facie

showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741 (*Jarrow Formulas*), fn. omitted.)

It is generally recognized, and is conceded in this case, that a "malicious prosecution action arises from acts in furtherance of defendants' right of petition or free speech." (See, e.g., *Zamos*, *supra*, 32 Cal.4th at p. 970.) "Thus, the issue is whether plaintiffs presented evidence in opposition to defendants' anti-SLAPP motion that, if believed by the trier of fact, was sufficient to support a judgment in plaintiffs' favor. Whether plaintiffs have established a prima facie case is a question of law." (*Id.* at p. 965.) "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, superseded by statute on other grounds as stated in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 547.)

2. Likelihood of Prevailing on Merits

To establish a claim for malicious prosecution, the plaintiff must prove that the defendant filed a prior action, which was brought maliciously and without probable cause, that the prior action terminated favorably to the plaintiff, and that the plaintiff suffered resulting damages. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d

863, 871-872 (*Sheldon Appel*).) An attorney may be held liable for malicious prosecution not only for commencing a meritless action, but also for continuing to prosecute a lawsuit discovered to lack probable cause. (*Zamos, supra*, 32 Cal.4th at pp. 970, 973.)

"The defendant in a malicious prosecution suit is protected if he or she acted with probable cause in bringing the prior proceeding, i.e., with a reasonable belief in the possibility of the suit being successful. [Citations.]" (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 506, at p. 744.)

The existence of probable cause to commence or continue pursuing a previous action is a question of law. (*Bergman v. Drum* (2005) 129 Cal.App.4th 11, 14, fn. 2.) The court must "make an objective determination of the 'reasonableness' of defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable." (*Sheldon Appel, supra*, 47 Cal.3d at p. 878.) The test applied to determine whether a claim is tenable is "whether any reasonable attorney would have thought the claim tenable . . . ." (*Id.* at p. 886.)

Here, despite Grenier's deposition testimony that he did not own the mare at the time of the Oklahoma auction, the record contains other evidence that tended to impeach his testimony. Grenier was the original purchaser of the mare in May 2002. When he bought the mare, he knew she could not be bred. He traded the mare to Baker the next day for two other horses; their agreement was oral, and there was no formal transfer of ownership. Grenier admitted that "quite a few times" he sometimes partnered with Baker in buying and selling horses. Grenier and Baker transported the mare to the Oklahoma auction in his truck with four of his own horses and one he and Baker "were partnering

on." The check from the auction company was issued to Grenier, who cashed it and kept most of the proceeds, because Baker owed him some indefinite and undocumented amount of money. Before the auction, Dr. Vrono went to Grenier's ranch to check all the horses, including the mare, that were being transported. Grenier paid Dr. Vrono's bill for those services. Dr. Vrono's patient history report listed Grenier as the owner of the mare. The auction listing identified Baker and Grenier as the consignors of the mare.

In short, although there was significant other evidence to the contrary, there were sufficient indicia of Grenier's ownership to create a reasonable basis to name him as a defendant. Moreover, in light of the allegations in the underlying action that Grenier and Baker had conspired and concealed information, the fact that Grenier declared he had never personally spoken to Davis or Vanlandingham was in large part irrelevant.

We conclude that, based on the above-listed evidence, a reasonable attorney could have thought the claim against Grenier was tenable. (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 886.) Thus, Grenier had no probability of prevailing on the merits of his malicious prosecution action, and the trial court therefore erred in denying defendants' special motion to strike.

C. Evidentiary Objections

In light of our conclusion that the trial court erred in denying the special motion to strike, defendants' evidentiary challenges are moot.

IV. DISPOSITION

The order appealed from is reversed. Costs shall be awarded to Defendants.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

MCKINSTER
J.